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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 70.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, *et al.*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF METROPOLITAN LIFE INSURANCE COMPANY.

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No. 70.

ADRIAN ETTELSON, JOSEPH A. FEDER, JACK RINZLER, *et al.*,

vs.

METROPOLITAN LIFE INSURANCE COMPANY.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF METROPOLITAN LIFE INSURANCE COMPANY.

Citation of Opinion Below.

The question certified to this Court has not been discussed in any opinion delivered herein by the Courts below. The question certified arose on defendant's motion to dismiss plaintiff's appeal from an order entered by District Judge Walker pursuant to his decision, in which he sustained the validity of the counterclaim, as contained in an opinion reported in 42 Fed. Supp. 488.

Statement of Jurisdiction.

This case comes to the Supreme Court on certificate from the United States Court of Appeals for the Third Circuit.

Statement of the Case.

The legal question presented for decision is stated by the Circuit Court of Appeals in its certificate as follows:

> "In a civil action in a district court upon a claim of a character formerly cognizable at law in which the defendant has filed a counterclaim of a character formerly cognizable in equity (or in an action at law under the provisions of Section 274b of the Judicial Code), is an order that the issue raised by the counterclaim shall be heard and disposed of by the court prior to the issue raised by the complaint an order granting an injunction within the meaning of Section 129 of the Judicial Code and therefore appealable under that Section?"

The manner in which this question was presented to the Circuit Court of Appeals is set forth in the statement of facts contained in its certificate to this Court. Briefly, the situation was that plaintiff instituted an action at law in the New Jersey Supreme Court to recover the benefits of certain life insurance policies. The case was removed to the Federal Court. The defendant insurance company filed an answer alleging defenses of fraud and also filed a counterclaim seeking rescission of the policies on the ground of material false statements in the applications. A motion to strike out the counterclaim was argued before Judge Walker, who, on December 29, 1941, entered an order denying the motion to strike and further ordering that the issue raised by the counterclaim be tried and disposed of by the Court prior to the jury trial on the issue raised by the complaint. Plaintiff thereupon appealed to the Circuit Court of Appeals on the ground that the Court erred in refusing

to strike out the counterclaim. The defendant countered with a motion to dismiss that appeal, contending that the order was not an appealable order. This motion to dismiss the appeal was resisted on the ground that that feature of it which ordered that the issue raised by the counterclaim be heard and disposed of first, was in effect an injunction. Hence the question certified to this Court arises from the defendant's motion to dismiss the appeal, and the sole question presented is: Is the order of December 29, 1941, an appealable order? The essence of the question presented is whether or not the order of December 29, 1941, constitutes an injunction.

Summary of Argument.

With respect to the former practice in the Federal Courts whereby equitable defenses were allowed to be interposed in law actions by virtue of Section 274b of the Judicial Code (28 U. S. C. A. 398), this court held in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379 that an order directing that the issues raised by the equitable defense be tried in advance of the issues raised by the complaint filed on the law side of the Federal Court constituted, in effect, an injunction, and hence that such order was appealable under Section 129 of the Judicial Code (28 U. S. C. A. 227). We contend that the doctrine of the *Enelow* case has no application to the present procedure, which is regulated by the Federal Rules of Civil Procedure, and hence that an order of the District Court directing that the issues raised by a counterclaim seeking equitable relief be tried by the court and disposed of in advance of the issues raised by a complaint seeking money damages, can no longer be regarded as an injunction or as an appealable interlocutory order.

ARGUMENT.

The appellate jurisdiction of the Circuit Courts of Appeals is set forth in section 128 of the Judicial Code (28 U. S. C. A. 225). With respect to interlocutory orders, such jurisdiction is limited to those orders or decrees specified in section 129 of the Judicial Code (28 U. S. C. A. 227), the material parts of which read as follows:

> "Where, upon a hearing in a district court, or by the judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree * * * an appeal may be taken from such interlocutory order or decree to the circuit court of appeals * * *".

Prior to the adoption of the Federal Rules of Civil Procedure, this Court held that an order similar to that entered herein on December 29, 1941, constituted in effect the granting of an injunction against the prosecution of the law action, and hence came within the scope of section 129 of the Judicial Code. *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379.

However, in view of the procedural changes brought about by the promulgation of the Federal Rules of Civil Procedure, the weight of opinion holds that the doctrine of the *Enelow* case now has no application, and that an order such as that entered herein on December 29, 1941, can not now be regarded as an order granting an injunction or as an appealable order.

The basic question presented by the certificate is whether the doctrine laid down by this Court in *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, still re-

tains its validity and vitality in view of the changes in the procedure of the Federal Courts effectuated by the promulgation and application of the Federal Rules of Civil Procedure.

In order to determine this question, an analysis of the *Enelow* case and of the changes made by the Rules, is necessary.

In the *Enelow* case the plaintiff instituted an action at law on a life insurance policy which was removed to the Federal Court. In its affidavit of defense, the defendant asked to have the policy cancelled because of the insured's false and fraudulent statements in the application. The District Court entered an order that the equitable issue raised in the affidavit of defense be heard by the court sitting in equity and in advance of the jury trial of any purely legal issues. It was this order which this Court held constituted the granting of an injunction and hence an appealable order.

In coming to this conclusion, Chief Justice Hughes, who wrote the opinion for the court, drew a distinction between an order entering a stay in the same proceeding and an order enjoining the prosecution of an entirely separate proceeding. Because of the established differentiation then recognized under existing procedure in the Federal Courts between an action at law and a suit in equity, the court went on to regard the District Court's order as essentially an injunction of an entirely separate proceeding. The Chief Justice said, beginning at 293 U. S. 381:

> "The decree of the District Court was interlocutory, and the question is whether it can be considered to be one granting an injunction and thus within

the purview of section 129 of the Judicial Code (28 U. S. C. A. 227) permitting appeal.

"This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of section 129. And, in this aspect, it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court, in view of the established distinction between 'proceedings at law and proceedings in equity in the national courts and between the powers of those courts when sitting as courts of law and when sitting as courts of equity.' Per Van Devanter, J., in *Griesa* v. *Mutual Life Insurance Co.*, 165 Fed. 48, 50, 51.

"When the Congress enacted section 274b of the Judicial Code, providing for equitable defenses in actions at law and the granting of affirmative equitable relief, the procedure was simplified but the substance of the authorized intervention of equity was not altered."

* * * * * *

"It is thus apparent that when an order or decree is made under section 274b, requiring, or refusing to require, that an equitable defense shall first be tried, the court, exercising what is essentially an

> equitable jurisdiction, in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose."

It will be observed that the Court, in the *Enelow* case, approached the problem then before it with the attitude which had grown up during the period when proceedings in law and in equity were distinct in nature and conducted in entirely separate and mutually hostile tribunals. The power of Chancery to enjoin proceedings in the law Courts was exercised as early as the reign of Henry VII, and, indeed, this constituted one of the articles of impeachment against Cardinal Wolsey. It was the subject of the notable controversy between Lord Coke and Lord Ellesmere in the time of James I. See *Story on Equity Jurisprudence,* Sec. 51, Sec. 874, and Note in 1 Chafee and Simpson, *Cases on Equity*, page 35.

The need for this branch of equity jurisdiction, and the purpose to be served by its exercise, arose from the fact that legal and equitable remedies were being administered in separate Courts, and that the parties could not have their controversy completely determined in either one. Thus it is stated in *Kerr on Injunctions*, page 13:

> "A defendant to an action at law has often some equitable defence which a Court of law cannot take cognizance of either by reason of want of jurisdiction, or from the infirmity of legal process. As it would be against conscience and good faith that the plaintiff at law should use the advantage of which he is thus possessed at law, a Court of equity will restrain by injunction an action at law where the right sought to be enforced by the action is subservient to an equitable claim which the defendant at law cannot set up there."

See also *Story on Equity Jurisprudence*, Sec. 875, and *Commercial Trust etc. Bank* v. *Hamilton*, 99 N. J. Eq. 492. Compare *Miles* v. *Illinois Central Railroad Co.*, 315 U. S. 698.

In the *Enelow* case, this Court was confronted by a situation lying half way between the traditional and complete separation of law and equity proceedings and the present dispensation, under Rule 2 of the New Rules, which fuses law and equity proceedings into one form of civil action. That half way station was the practice springing from section 274b of the Judicial Code (28 U. S. C. A. Sec. 398), which authorized equitable defenses to be interposed in actions at law. The effect of this section, and of 274a, was characterized thus by Chief Justice Taft in *Liberty Oil Co.* v. *Condon Bank*, 260 U. S. 235, at page 243:

> "To be sure, these sections do not create one form of civil action as do the codes of procedure in the States, but they manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and are long steps toward code practice."

The final "long step" has now been taken, and Section 274b of the Judicial Code has been superseded by Rule 2 of the Federal Rules of Civil Procedure. Thus, the statutory basis underlying the *Enelow* case has now been swept away.

The power to effect a procedural union of law and equity suits was specifically given to the Supreme Court by Congress, 48 Stat. 1064, (28 U. S. C. A., sec. 723c). That act provides, *inter alia:*

> "The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both * * *"

Pursuant to the authority thus given, it is provided in Rule 2 of the Federal Rules of Civil Procedure:

> "There shall be one form of action to be known as 'civil action' ".

Insofar as its effect upon previous federal legislation is concerned, this Rule is to be given the force and effect of a Congressional enactment. Compare *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 9. See also *John R. Alley & Co.* v. *Federal National Bank*, (C. C. A.—10) 124 Fed. (2) 995; 52 Harvard Law Review, p. 1002, 1004 n. 13.

Furthermore, in the Notes of the Advisory Committee on Rules, it is stated that Rule 2 supersedes section 274b of the Judicial Code relating to equitable defenses. The Notes of the Advisory Committee have been frequently recognized by the lower courts as an authoritative guide to the proper construction of the Federal Rules of Civil Procedure.

See for example:

Beach v. *Beach*, (App. D. C.) 114 Fed. (2) 479;
Ripperger v. *A. C. Allyn & Co. Inc.* (C. C. A.—2) 113 Fed. (2) 332, 334;
Sherwood v. *U. S.* (C. C. A.—2) 112 Fed. (2) 587, 590;
Carpenter, Babson & Fendler v. *Condor Pictures, Inc.* (C. C. A.—9) 110 Fed. (2) 317, 320;

Food Machinery Corp. v. *Gingnard,* (D. C.-Ore.) 26 Fed. Supp. 1002;

U. S. v. *Aluminum Co. of America,* (S. D.-N. Y.) 1 F. R. D. 71, 76.

These various considerations lead irresistibly to one conclusion: that the action of Congress in authorizing the Supreme Court to formulate the Rules of Civil Procedure and the action of the Court in promulgating Rule 2 have rendered section 274b of no effect, and have thus destroyed the statutory basis of the holding in the *Enelow* case that the order appealed from was in effect an injunction. Hence we now have a situation where the fiction that a Federal District Judge had separate individuality and separate powers as a Chancellor and as a Law Judge, can no longer be maintained. The District Court no longer has a law side and an equity side. No longer is a proceeding instituted as either an action at law or a suit in equity. Both legal and equitable relief are now obtainable in the same proceeding and under the same rules of procedure.

The requirements of the 7th Amendment to the Constitution which preserves jury trials "in suits at common law" is still preserved under the new Rules (See Rule No. 38). While trial by jury is a basic right in suits at common law, which may not be taken away, the procedure by which such right may be given effect is subject to modification from time to time. *Walker* v. *Southern Pacific Railroad,* 165 U. S. 593; *Ex Parte Peterson,* 253 U. S. 300; *Gasoline Products Co. Inc.* v. *Champlin Co.,* 283 U. S. 494.

The new Rules have now established in effect, one Civil Court. There is no longer a Federal Court of Law and a

Federal Court of Equity. The same individual holding the judicial office no longer lightly changes himself from a Court of Law to a Court of Equity, or vice-versa. He is solely and simply Judge of a Civil Court, administering justice according to uniform rules of procedure. In the order now in question, no Court designated to try an action at law is enjoined. There is no such Court to enjoin, and there is no party in an action at law to be enjoined. When this case began in the New Jersey Supreme Court, it was in every respect an action at law. New Jersey very strictly observes the distinction between remedies at law and remedies in equity and the enforcement thereof by separate tribunals. *N. J. Constitution*, Art. 6, Sec. 1; Art. 10, Sec. 1; See *Estate of Gilbert Smith, Inc.* v. *Cohen*, 123 N. J. Eq. 419; *San Giacomo* v. *Oraton Investment Co.*, 103 N. J. Eq. 273.

Plaintiffs' counsel, bred to the New Jersey practice, so far forgot the changes in the Federal practice made by the new Rules, that he worded his motion to strike as on the ground that "the defendant has an adequate remedy on the law side of the Federal Court in the action at law instituted in the New Jersey Supreme Court". See Certificate, page 2, line 10.

But removal of the case to the Federal Court wiped out this sharp distinction. It became merely a civil action, to be proceeded with according to the Federal Rules of Civil Procedure. The order did not enjoin anything or anybody. It would be foolish to say that the Court enjoined itself. All that the order did was to provide that one phase of the case should be tried before another phase of the case was tried.

If, on the hearing of this first phase of the case, the Court should hold that the policies of insurance should be cancelled, there would be obviously no occasion for the Court to consider the second phase of the case as to whether the plaintiffs should receive the proceeds of the policies. On the other hand, if the Court on the trial of the first phase of the case should hold that the policies should stand, the second phase of the case would then for the first time become pertinent, and the Court could go into the question of how much, if anything, the plaintiffs should recover.

The result is that the order which is the subject of the appeal in this case to the Circuit Court of Appeals, can no longer validly be regarded as an injunction of a separate proceeding, but must be considered as a mere stay of one phase of the proceedings entered by the Court in the exercise of its "inherent power to control the progress of the cause so as to maintain the orderly processes of justice." *Enelow* v. *New York Life Insurance, supra,* at page 382. See also *Landis* v. *North American Company,* 299 U. S. 248, 255; *American Life Insurance Co.* v. *Stewart,* 300 U. S. 203, 215; *Emery* v. *Central Trust & Safe Deposit Co.,* (C. C. A. 6) 204 Fed. 965.

Such an order, being interlocutory, is not appealable. *Schoenamsgruber* v. *Hamburg Line,* 294 U. S. 454; *Cover* v. *Schwartz,* (C. C. A. 2) 112 Fed. (2) 566; *Zalatuka* v. *Metropolitan Life Ins. Co.,* (C. C. A. 7) 108 Fed. (2) 405.

The foregoing analysis is fully supported by the recent decision of the Second Circuit Court of Appeals in *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.,* 124 Fed. (2) 563. This case is of especial interest and authority because the opinion was written by Judge Charles E. Clark, who was

formerly the Reporter to the Advisory Committee appointed by the Supreme Court to draft the Rules.* The question presented to the court was stated by Judge Clark as follows at 124 Fed. (2) 564:

> "The question herein is whether or not an order refusing trial by jury constitutes a final and appealable judgment of the district court.
>
> "Plaintiff sued for a declaratory judgment and extensive injunctive and other relief against a patent, owned and used by defendants, for a method of knitting. Defendants counterclaimed for a judgment declaring the patent valid and infringed. They also filed demand for trial by jury of all the issues of both complaint and counterclaim. On separate motions by plaintiff the district court dismissed the counterclaim and then 'annulled' defendant's jury demand because 'no jury trial as matter of right attends plaintiff's cause of action,' and 'Counterclaim has been dismissed, no attempt has been made to show any other issue entitled to jury trial.' This appeal is taken from this second or annulment order only."
>
> • • • • • •
>
> "Plaintiff has moved to dismiss this appeal as being taken from only an interlocutory, nonappealable order, and not the final order required by 28 U. S. C. A. section 225. Defendants, however, rely upon the case of *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440, where, by ingenious reasoning based upon the then divided law

* As illustrative of the weight given by the lower courts to the views of Judge Clark in interpreting the Rules, see, for example, *Kuenzel* v. *Universal Carloading & Distributing Co.*, 29 Fed. Supp. 407, 409; *S. E. C.* v. *Timetrust, Inc.*, 28 Fed. Supp. 34, 41; *Bankers Bond & Mortgage Co.* v. *Witherow*, 1 F. R. D. 197, 198; *U. S.* v. *Schine Chain Theatres*, 1 F. R. D. 205, 207; *State of Maryland* v. *Pan-American Bus Lines, Inc.*, 1 F. R. D. 213, 215; *Diepen* v. *Fernow*, 1 F. R. D. 378; *Smith* v. *Belmore*, 1 F. R. D. 633, 635.

and equity procedure of the federal courts, the Court held an order transferring an action from the law to the equity side of the court as the equivalent of an equity decree staying an action at law and hence appealable as an order granting an interlocutory injunction under 28 U. S. C. A. section 227. But we think there are two complete answers to this contention: first, that this is not the *Enelow* case, and second, that the *Enelow* case is not applicable to present-day federal practice where law and equity are united in a single civil action, which affords all appropriate relief to all the litigants before the court."

It is the court's reasoning on the second proposition which, we submit, should be followed in disposing of the question at bar. The court stated at 124 Fed. (2) 565:

"Hence we turn to the second point, that the entire analysis is out of place for that united system of law and equity which the Supreme Court acting under section 2 of the Enabling Act of June 19, 1934, c. 651, sections 1, 2, 48 Stat. 1064, 28 U. S. C. A. sections 723b, 723c, ordered as its initial step in fashioning the new rules (order of June 3, 1935, 295 U. S. 774) and which has been one of the most successful and useful accomplishments of that reform. Pike and Fischer, Pleadings and Jury Rights in the New Federal Procedure, 88 U. of Pa. L. Rev. 645, 665-670. For it all presupposes two different systems of justice administered by separated tribunals, even if no more than different 'sides' to the same court; and when that separation is abandoned, the premise upon which these cases depend is gone. Hence, as Professor Moore so succinctly demonstrates, the Enelow case cannot remain controlling after its basis

has been removed. 3 Moore's Federal Practice 3025, 3026. Indeed, except as we resort to the old dichotomy, with all its useless complications, so remote from our modern legal habits, we lack any rationale to explain the concept of a judge enjoining himself when he merely decides upon the method he will follow in trying the case. The metamorphosis of a law judge into a hostile chancelior on the other 'side' of the court could not have been overclear to the lay litigant under the divided procedure; but if now without even that fictitious sea change one judge in one form of action may split his judicial self at one instant into two mutually antagonistic parts, the litigant surely will think himself in Alice's Wonderland. We therefore hold the order not now appealable; error may, of course, be assigned as to it if review of final judgment is ultimately had."

In 3 *Moore's Federal Practice*, page 3026, the effect of the Rules upon the doctrine of the *Enelow* case, is discussed as follows:

"The theory of the *Enelow* case is not applicable under the Rules. Its theory was undoubtedly sound as applied to old English practice when there were separate law and equity courts, since an equitable defense could not be interposed in the common law courts and the defendant in the law action did go into chancery and actually seek an injunction against the law action. The theory of the *Enelow* case becomes questionable as applied in the case actually presented to the Supreme Court, since there were no longer separate courts and Congress had merely enlarged the defenses available in a law action by providing for equitable defenses. But there remained a law side and an equity side of the court, with sep-

> arate procedures, and this disunion may justify the result. Such a result could not be justified under the union of law and equity contemplated by the Rules. It is anachronistic to think in terms of an injunction against a law action in a procedure which has only a civil action and does not have actions at law and suits in equity."
>
> See also 4 *Pomeroy's Equity Jurisprudence* § 1370.

An illustration of the proper judicial approach to questions involving the effect of Rule 2 is furnished by the opinion of the Third Circuit Court of Appeals in *Cohen* v. *Globe Indemnity Co.*, 120 Fed. (2) 791. The question there presented was whether or not the order appealed from constituted a final judgment. That was a suit to recover on two policies of burglary insurance. The first trial had resulted in a judgment for plaintiff, which had been reversed on appeal. While the case was awaiting retrial, the plaintiff filed an amendment to his complaint, which in effect added a count for reformation of the policy. Subsequently, after hearing, the trial judge entered an order that the contract be reformed as prayed, and listed the case for retrial. From this order, the defendant took an appeal, and the Circuit Court of Appeals, on motion, dismissed the appeal, on the ground that the order did not represent a final judgment in the case, even though it did terminate the "equity" phase. Judge Goodrich, speaking for the court, said at 120 Fed. (2) 791:

> "The appellant argues that prior to the adoption of the new rules such an order would have been appealable. He contends that prior to the new rules where reformation was sought of an instrument upon which an action at law had been begun, the petition

for reformation would have had to have been filed on the equity side of the court, the action at law being stayed meanwhile. He says further that if, in the equity proceedings, reformation were ordered, an appeal would lie from that order."

• • • • • •

"Under the present practice the system is unified. Rule 2, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. Does the coalescing of law and equity mean that the decision is not final until the litigation on what, under the prior practice would have been both the law and equity sides, has been completed in the trial court? We conclude, with full recognition of the inconvenience to the defendant in the particular case, that it does. There is only one law suit pending between the parties. As an incident in the trial of that suit, the trial judge has ordered a reformation which affects the terms of the agreement between them. But no judgment has been rendered. The defendant is neither under an obligation to pay money nor has he the protection of a judgment which exempts him from payment. Indeed the trial judge very carefully refrained from doing what an equity court in former days would have done, namely, to finish up the litigation before him as chancellor by awarding damages for breach of contract following its reformation, since the defendant had asked for jury trial and Rule 38, Rules of Civil Procedure, was thought to entitle him to it. We have litigation which is then half through. We have a statute which says we are limited in review to final decisions. The appeal must therefore fail.

"Many attempts at procedural improvement during the 19th century were only partially successful because both courts and lawyers trying cases carried

> into the new practice the technical niceties of the old. A better fate should await the present rules. We have no desire to approach the change made by rule two with 'a psychological attitude which goes back to the historical conflict between Coke and Ellesmere.'
>
> "The appeal is dismissed."

This decision is significant because it holds that a civil action is essentially a unity, even though both legal and equitable remedies are sought therein, and is not merely the harnessing together of two separate entities. As applied to the question certified to this court, the doctrine of the *Cohen* case leads to the conclusion that the suit at bar is but one civil action and not two separate suits consolidated for decision, and hence that the provisions contained in Judge Walker's order of December 29, 1941, are to be regarded as only a procedural step in the cause in which it was entered, and not as an injunction of an entirely separate proceeding.

Also significant on this question is the Note of the Advisory Committee commenting on Rule 39 of the Federal Rules of Civil Procedure, which deals with trial by jury or by the court. The Committee states therein:

> "When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried."

This statement certainly indicates that the Committee which drafted the Rules contemplated that the trial court, in the exercise of "its inherent power to control the progress of the cause so as to maintain the orderly processes

of justice," could dispose of the non-jury issues in advance of the jury issues. It is inconceivable that the Committee intended, by this comment, to nullify the effect of Rule 2 and to open the door to unnecessary interlocutory appeals.

As stated in Rule 1, the object of the Rules is "to secure the just, speedy, and inexpensive determination of every action." Certainly that purpose would not be furthered by a construction of Rule 2 which permits multiple appeals.

Furthermore, it has been a matter of unvarying policy to discourage interlocutory appeals in the federal courts. Thus prior to 1891, there was no method whatever of reviewing on appeal an interlocutory order or decree of the District or Circuit Courts. Cf. *Drentzer* v. *Frankfort Land Co.*, (C. C. A. 6) 65 Fed. 642, 644. Today, the situations in which an interlocutory appeal may be taken are strictly limited by section 129 of the Judicial Code. (Compare the practice in New Jersey, for example, where an appeal may be taken from any interlocutory order in Chancery proceedings. Revised Statutes of 1937, 2:29-117.) It is clear, therefore, that Congress does not favor interlocutory appeals. Nor do the courts. See *Cobbledick* v. *United States*, 309 U. S. 323; and remarks of Judge Frank in *Perkins* v. *Endicott Johnson Corp.*, (C. C. A. 2), 128 Fed. (2) 208, 211.

To sum up, therefore, the effect of Rule 2 is to destroy the statutory basis upon which the decision of this court in *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379, rested, and to create a situation where an order by the trial court that the issues on a counterclaim seeking equitable relief be tried by the judge in advance of a trial by a jury of the issues on a complaint seeking money damages, can no longer be validly regarded as an injunction. This is the

result of the analyses of the problem made by Judge Charles E. Clark and by Professor Moore. It is also the result indicated by the treatment accorded to Rule 2 in *Cohen* v. *Globe Indemnity Co.*, 120 Fed. (2) 791; as well as by various notes of comment by the Advisory Committee on Rules followed by the lower courts and by the settled policy of discouraging interlocutory appeals in the federal courts.

In conclusion, we submit that the question certified should be answered in the negative: First, because the order appealed from is an interlocutory order which is not an injunction, and secondly, because the system of procedure under the Federal Rules of Civil Procedure renders the doctrine of the *Enelow* case no longer applicable.

Respectfully submitted,

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